The Companies Act 2006

Citation for published version:
Hardman, J 2020, 'The Companies Act 2006: It's time to complete the transition', *The Company Lawyer*, vol. 41, no. 4, pp. 93-97.

THE COMPANIES ACT 2006: IT'S TIME TO COMPLETE THE TRANSITION.

*JONATHAN HARDMAN**

A. **THE TRANSITION**
B. **A NOW SUPERFLUOUS LONG-TERM TRANSITIONAL PROVISION**
C. **A HIDDEN TRANSITIONAL PROVISION**
D. **PROPOSALS**

A. THE TRANSITION

The final sections of the Companies Act 2006 were implemented on 1 October 2009.[1] This means that it is now 10 years since the last stage of the Companies Act 2006 was implemented into UK law. It is therefore an appropriate time to review what remains left of the transition. As most will recall, the Companies Act 2006 was implemented in several stages. Certain changes were effective upon the act receiving royal assent.[2] Given its complexity and the radical modernisation of various elements of the company law regime, a staged roll out of the remainder of the provisions was undertaken on several dates, the most important of which being 6 April 2017,[3] 1 October 2007,[4] 6 April 2008,[5] 1 October 2008[6] and 1 October 2009.[7] The purpose of this article is use the 10 year anniversary of the implementation of the final elements of the Companies Act 2006 to argue that it is time to complete the transition from the Companies Act 1985 to the Companies Act 2006.

As well as a staged implementation, we can identify five different types of transitional provisions between the 1985 act regime and the 2006 act regime, depending on how they were implemented:

1. The first category comprises of those provisions of the Companies Act 2006 which took immediate effect upon implementation, meaning that they applied to all companies automatically. For example, the provisions in respect of the change of name of a company applied automatically to resolutions passed on or after 1 October 2009 and any such resolutions passed prior to such date which had not been sent in to the Registrar of Companies.[8] We can refer to this category as consisting of those provisions of automatic application.

---

*Jonathan Hardman, Lecturer of International Commercial Law at the University of Edinburgh

[1] See "Companies Act 2006 finally implemented: but is it a new type of Companies Act" 2009 Company Law Newsletter 261

[2] Being Companies Act 2006 Parts 43(transparency obligations and related matters), 44 (miscellaneous provisions), 46 (general supplementary provisions), and 47 (final provisions) , Companies Act 2006 s1300

[3] Being primarily Companies Act 2006 ss942 – 992 (relating to takeovers) – The Companies Act 2006 (Commencement No. 2, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2

[4] Implementing most of the following sections: Companies Act 2006 ss145-269 (members' rights, directors and derivative claims) (some of these were delated until 1 October 2008, and some delated until 1 October 2009), ss281 – 379 (resolutions, meetings, control of political donations), ss993 – 999 (fraudulent trading and unfair prejudice) and ss1035-1039(amendments to the company investigations regime) - The Companies Act 2006 (Commencement No. 3, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2

[5] Implementing most of the following sections: Companies Act 2006 ss270 – 280 (relating to company secretaries), ss380-539 (relating to accounts and reports and audit), ss738-790 (relating to debentures, public and private companies, the certification of securities), ss829-853 (relating to distributions), ss895 – 941 (relating to arrangements, reconstructions, mergers and divisions) and ss1209 – 1264 (relating to statutory auditors) - The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 3

[6] Implementing provisions related to reductions of capital be private companies - The Companies Act 2006 (Commencement No. 7, Transitional Provisions and Savings) Order 2008, SI 2008/1886, art 2

[7] Implementing the rest of the provisions which were being enacted – see The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3

[8] Companies act 2008 ss77-81 - The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Schedule 2, para 19

2. The second category are those provisions which allowed for a short transitional period between the two regimes. This allowed, for example, incorporation forms received prior to the relevant switch over date (1 October 2009) under the 1985 act regime to be processed after that date.[9] We can refer to this category as lapsed transition – there were transitory provisions which were relevant for a short period of time, and that time period has now lapsed, meaning that the transition from the 1985 act regime to the 2006 act regime has completed.

3. The third category are those provisions which were expressly long term in their transition. These provided that the new rules applied automatically to companies incorporated under the Companies Act 2006 (or after a certain date), and also applied to older companies IF a certain procedure was followed. There was no time period for this transition to be completed by, meaning that we can call provisions in this category long-term transition provisions.

4. The fourth category are those provisions which purported to be of automatic effect, but had an indirect effect on pre-2006 act companies. These provisions provided for a statement of immediate effect, but applied to part of the regime which was fundamentally changed by the introduction of the 2006 act regime. For example, the 1985 act regime required every company to have a seal.[10] The 2006 act regime does not.[11] This was of immediate application. However, there is a possibility that a pre-2006 act company had acted on the previous regime, for example by including in its articles of association that documents required to be signed by reference to the company seal. The immediate application of the 2006 act regime therefore was not the end of the story for such pre-2006 act company, and further internal changes were required despite being not directly mandated by the change of regimes. We shall call this category hidden transitional provisions, and it is illustrated by example in part C of this article.

5. The fifth and final category of provisions are those which never transitioned to the 2006 act regime. Provisions relating to the Scottish floating charge (its existence, creation and registration) remain governed by the 1985 act regime,[12] and provisions in respect of company inspections,[13] were not restated in the 2006 act regime. Accordingly, the provisions contained in the 1985 act regime remain the provisions which govern these areas.

Instinctively, it feels as if there is no more to be said in respect of the transition between the Companies Act 1985 and the Companies Act 2006. After all, the process seemed clear for its application to pre-2006 act companies: category 1 changes were immediate, category 2 changes were effected at a point of time which is now passed and category 3 changes could apply if such companies chose to apply them. As a result by now, 10 years on, those who wished to apply such rules will have, and those who did not wish to will not have. Similarly, it seems that any issues caused by category 4 would now be resolved out of necessity, and the lack of a transition of those in category 5 means a lack of a transition to worry about.

However, memories fade over time. This article will argue that retaining the transitionary arrangements from ten plus years ago presents risks to those pre-2006 act companies which have not undertaken any activity since 2006. Statements in company law texts which used to provide nuances between pre-2006 act companies and post-2006 act companies have now often been replaced with the stark assumption that the company in question is a post-2006 act company. Whilst the above transitionary rules in respect of the third

[9] The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Schedule 2, para 2
[10] Companies Act 1985, s350
[11] Companies Act 2006, s35(1).
[12] Companies Act 1985, s462 - 466
[13] Companies Act 1985, Part XIV

and fourth categories may have had legitimate application at the time, after a decade of the new regime, it is time to rethink their application.

In order to make this case, this article shall review a long-term transitional provision (that is, a category 3 provision) which is now superfluous, being the transition of the conflicts regimes from the pre-2006 act regime to the post-2006 act regime. It shall then review a hidden transitional provision (a category 4 provision), that in respect of amendments of articles and objects clauses. It shall conclude that these provisions are now either superfluous or actively harmful, and that instead given the passage of time a new approach should be taken in respect of pre-2006 act companies.

B. A NOW SUPERFLUOUS LONG-TERM TRANSITIONAL PROVISION

The first example that we shall review is of a long-term transitional provision, being the provisions in respect of the ability of directors of a private company to authorise another director to have a conflict of interest. Under the 2006 act regime, it is possible for the other directors of a private company to authorise one of their number to have a conflict of interest with the company, unless the articles prohibits such authorisation.[14] This is of particular relevance to private companies within groups of companies, as the same person may be director of several group companies which poses a potential conflict of interest, or risk such a conflict being created by having also other roles (for example, shareholder or a director of a shareholder).[15] As a result, this provision can be of practical importance to corporate groups. The implementation of this provisions stated that this applied automatically to companies incorporated on or after 1 October 2008.[16] However, for those companies incorporated before 1 October 2008, this provision only applied if the members of the company gave their approval for it to apply.[17] Accordingly, for companies incorporated after 1 October 2008, directors (always excluding the affected director) are able to authorise the conflicts of one of their numbers, whereas for those incorporated prior to such date, this could only be used if the members had passed a resolution to approve it. If the articles of association are silent, there is a difference between the two types of companies: for the newer companies, silence means the directors can approve the conflict. For the older companies, silence means that the directors cannot.

At the time of the implementation of the Companies Act 2006, this was inherently sensible. Shareholders of existing companies had signed up to a regime that was more prohibitive of approval of director conflicts,[18] and the introduction of director approval for director conflicts was described as a "major innovation".[19] Accordingly, it made sense for shareholders to have to actively opt in to the new regime, rather than risk their corporate contract being fundamentally re-written by accident.

However, the new regime has been operating for over 10 years now. The date of 1 October 2008 is now long in the past and no longer retains its relevance. By now, the concept of directors of private companies being able to, when faced with silence in the constitution, authorise the conflict of one of their own is no longer revolutionary but instead the established practice. So much so that the tenth edition of Gower and Davies' states:

> "*In the case of private companies, the board can act as the authorising body unless something in the company's articles or other or other parts of its constitution restricts the board from so acting*."[20]

---

[14] Companies Act 2006, s175(5).
[15] See E Brown "A case of split loyalty? Multiple directorships and conflicts of interest under the Companies Act 2006
[16] The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, para 47(3)(a)
[17] Ibid, para 47(3)(b)
[18] E.g. *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All E.R. 1222 PC (New Zealand) as discussed in M S A Alotaibi "Regulating conflicts of interest in post-CA 2006 era: Part 2: is authorisation by the board a good invention?" 2013 International Company and Commercial Law Review 351
[19] P L Davies and S Worthington "Gower Principles of Modern Company Law" (10th edition, 2016), para 16-103.
[20] ibid, para 16-104.

This does not differentiate between whether a company existed prior to 1 October 2008 or not,[21] but as the transitional provision is a long-term transitional provision (a category 3 provision), it applies forever to companies incorporated based upon that now seemingly arbitrary date. This highlights the danger of long-term transitional provisions: there is a chance that they are assumed to fall into the second category, being those transitional provisions of limited temporal relevance which have now transitioned to the 2006 act regime. In fact, they are of permanent application – the transitional provisions in this area remain as much part of company law as the provisions of the Companies Act 2006 itself.

As such, this transitional provision has served its purpose. The cut-off date was once of key importance but now, following the passage of time, is arbitrary. The provision for older companies is no longer coherent with general company law as a whole. In addition, the passage of time adds a perniciousness to the concept: it is likely that market participants would not consider "transitional provisions" to remain relevant. This means that the directors of a corporate group acquiring an older company may consider that the face of the s175 of the Companies Act 2006 applies, whereas their new acquisition will still be governed by the transitional rules designed to implement it. Of course, if the shareholders have made such an election previously, then the issue is irrelevant and the company proceeds on the same basis as a newer company. But the absence of such a resolution being made, together with a silence from existing shareholders, creates a superfluous division between companies incorporated before .

C. A HIDDEN TRANSITIONAL PROVISION.

Problems for older companies do not only exist under long-term transitional provisions. Instead, combinations of laws which changed the regime can still have practical relevance to older companies. As all will recall, under the 1985 act regime, each company needed to have an objects clause which listed its objects.[22] Following the Companies Act 1989, breach of the objects became irrelevant vis-à-vis third parties,[23] but retained its internal effect: shareholders had a remedy against directors if they breached the objects clause.[24]

Under the 2006 act regime, a company does not need to have an objects clause, and is deemed to not have an objects clause unless it specifically elects to include an objects clause.[25] Any attempt to include, alter, or removal an objects clause needs to be filed with the registrar of companies,[26] and the amendment only takes effect upon being so registered.[27]

If this were the only change, then there would be no issue. However, this change collided with another change to the structure of company law. Objects clauses used to be contained in the memorandum of association.[28] On implementation of the 2006 act, every provision of each older company's objects were deemed to be treated as part of the articles of association of a company.[29] However this was, of course, only a deemed incorporation – there was no requirement to file an updated set of articles of association to reflect all the terms that were once in the memorandum to reflect the entire picture.[30] This meant that, following implementation of the 2006 act, it was necessary to look at the latest articles of association AND the latest memorandum of association to establish the entire terms of the constitution of the company.

---

[21] It should be noted that Palmers' Company Law does – see G Morse et al eds "Palmer's Company Law" (Release 163, 2019) para 8.2129.
[22] Companies Act 1985 s3A
[23] Companies Act 1989 s108, which replaced Companies Act 1985 s35(1)
[24] Companies Act 1985 s35(3)
[25] Companies Act 2006 s31(1)
[26] Companies Act 2006 s31(2)
[27] Companies Act 2006 s31(2)(c)
[28] Companies Act 1985 s3A
[29] Companies Act 2006 s28.
[30] The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Schedule 2, para 8

However, if a company has changed its articles on or after 1 October 2009,[31] then the old provisions of the memorandum of association can mostly be ignored, and only the new articles would need to be examined. The main exception to this would be the objects clause, which would remain until/unless the registrar was notified in the prescribed manner of its removal. This latter distinction has now been lost over time. So when Palmers' Company Law says:

> *"for companies registered under the predecessor acts to the Companies Act 2006 provisions of their memorandums of association are to be treated as provisions of the articles. Thus, such matters as the company's objects, a matter previously addressed in clause three of the memorandum of association, will continue to be part of the company's constitution but will be treated as though they are now a provision of the articles, and subject to those rules on the articles of association contained in the Companies Act 2006"*[32]

an incorrect perception could be created that the mere act of replacing articles of association with those which do not contain an objects clause removes the effect of the objects clause from the company's constitution in and of itself. Now, Palmer's Company Law has a thorough discussion about the change of an objects clause, which includes discussion of the need to register such a change.[33] This means that someone who is looking to make an active amendment to remove an objects clause will be in no doubt that they need to make a filing. The danger, however, comes when faced with an older company which has, since 1 October 2009, amended its articles of association, and either actively removed or stayed silent as to its objects but not made the appropriate filing to the Registrar of Companies in the prescribed form in respect of its objects. In such a situation, there is a risk that market participants will follow flawed logic that the objects clause used to be in the memorandum, the memorandum is now deemed to be part of the articles, and the new articles are silent to as to objects, therefore, following the general statement as to the objects of a company, the objects of the company are unlimited. In other words, the change of two legal regimes (the objects clause and the memorandum of association) has created a risk of a confusion. As a trainee solicitor on 1 October 2009 would now be in their mid-thirties, with every younger practitioner trained under the 2006 act regime, this is becoming increasingly a risk. This is why this area falls into the fourth category of the hidden transitional provision – there is nothing transitional about the arrangements, but the interaction of the legislative provision created a quasi-transitional issue for older companies. It is transitional in effect, not in substance.

Once more, at the time of the implementation of the Companies Act 2006, this regime was inherently sensible. Shareholders had agreed to invest on the basis of specified objects, and the concept of entirely unlimited objects was novel and therefore unusual. But now, for market practitioners, unlimited objects are the norm. When faced with a constitution which was silent on the matter, the usual position now is that there are no objects. It is likely that, if articles have not been amended since 1 October 2009, market participants will realise that they need to look at the older rules and transitional provisions. However, when faced with articles which have been amended since 1 October 2009 (especially if amended just afterwards), given the passage of time they are less likely to remember that a different regime applies to such company. This means that there is a risk that those buying older companies see that the objects clause is not included in articles of association which were adopted after 1 October 2009, and presume that this means that the objects clause was historically removed. Without the prescribed form being filed, the objects clause will still remain valid and in place. The concept of an objects clause is now so unusual in new companies that when faced with a change – introduction of a new objects clause or removal of a previous objects clause – everyone is likely to identify that a different regime applies. However, given the rarity of such objects clauses in new companies now, there is a risk that historic objects clauses remain relevant when assumed by all to be repealed by merely replacing the articles.

---

[31] The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 SI 2008/2860, Article 3(c) and Schedule 2 paras 7 - 9
[32] Palmer's Company Law (n 21 above) para 2.1108
[33] Palmers (n 21 above) paras 2.639 – 2.643

Ironically, this issue arises because of the smoothness of the transition to the 2006 act regime. If the implementation of the 2006 act regime had stated that older companies needed to choose to retain or remove their objects clause within a set time period, then this would have made the transition less smooth but permanently resolved the issue by aligning all companies on to the new regime. The transition's ability to proceed on the basis of the 1985 act regime until/unless shareholders resolved otherwise was, at the time, inherently helpful. It has now outlived its utility. Now, objects clauses are deemed an anachronism. Those older companies who retain objects clauses from their memoranda may well have done so because they have evaluated the legal position and concluded they would like to retain one. However, those who have adopted wholescale articles of association but not filed the necessary paperwork to remove their objects clause are highly unlikely to have done so. It is time that the presumption that objects are unlimited be broadened to companies incorporated prior to 1 October 2009 as well as those incorporated after.

D. PROPOSALS

This article has highlighted that some of the transitional framework between the 1985 act regime and the 2006 act regime remains relevant, despite the passing of time and despite the increasing irrelevance of the previous legal regime. It has provided an example of a long-term transitional provision remaining in place, despite the decrease of academic acknowledgment of this. It has also provided an example of a hidden transitional provision remaining relevant.

It is time to complete the transition from the 1985 act regime to the 2006 act regime. For our specific examples, this is relatively easy. For directors' ability to approve conflicts of interest, this is only ever a default rule. The 2006 act regime is that the directors can do so if the articles are silent. Accordingly, shareholders retain their ability to include a provision in the articles stating that they do not want this regime to apply. It is time that the presumption, when faced with silent articles, for pre-2006 act companies to match that which has applied to post-2006 act companies for over a decade. For objects clauses, it should be provided that a pre-2006 act company adopting new articles is now deemed to remove its objects clause unless one is expressly included in the articles. Once more, this will align the presumptions across the two types of companies, and bring older companies fully within the now-longstanding 2006 act regime.

This article has, however, highlighted a larger evil – the smoothness of the transition between the 1985 act regime and the 2006 act regime was to be applauded. That the transition remains in any way relevant is, however, a pernicious oversight which should be corrected as a priority. The final provisions of the transition from the Companies Act 1985, being those long-term transitional arrangements and hidden transitional arrangements, should be brought into line with the approach taken for companies incorporated within the last decade. Those provisions which remain under the Companies Act 1985 should be restated so that this fine act can finally be laid to rest.